

Digest of a Performance Audit of the Utah Anti-discrimination Division

This report addresses a number of issues related to the administration and enforcement of employment discrimination law. The Utah Anti-discrimination Act defines illegal employment discrimination and provides an administrative process to address alleged violations of the law. The Utah Industrial Commission, including its Anti-discrimination Division (UADD) and its Adjudication Division, receives, mediates, investigates, and adjudicates allegations of illegal employment discrimination. If the commission finds a claim of illegal discrimination is valid, it orders the employer to cease discriminatory conduct and to provide appropriate relief to the individual such as reinstatement, back pay, and attorney fees. In our opinion, some parts of the anti-discrimination system operate well, while others need significant improvements. Summaries of our main findings are below:

Minor Improvements can be Made in Intake and ADR. Intake and alternative dispute resolution (ADR) are the first two steps in UADD's administrative case-handling process. Overall, we found no significant problems with the performance of these areas. Minor improvements in the intake process are possible by providing more information about the law and administrative process to complainants before they decide to file a charge of discrimination and by conducting more thorough intake interviews. We commend UADD for implementing the ADR program which has helped reduce the division's case backlog through the mutual resolution of employment disputes by the parties. We feel consistent and quality performance could be ensured at ADR by improving its policies and procedures.

Management Control is Needed for Investigations. Unlike the minor changes needed to improve UADD's intake and ADR functions, fundamental changes are needed to improve the investigation function. Because UADD lacks effective management control, we found that both the determination of whether discrimination occurred and the amount of evidence gathered to reach an investigative conclusion vary greatly from investigator to investigator. Similarly, investigators have large differences in the number of cases closed and the time it takes to close cases. We found that UADD investigators make decisions about charges based on different philosophies and with little accountability. While each investigator must exercise professional judgement and discretion in deciding what evidence to gather and how to interpret its meaning, professional judgement should be exercised within a management structure that guides and controls it. We feel UADD needs to establish basic management control to guide and direct investigations, including procedures, training, supervision, and review.

Legislature Should Allow UADD to Participate in Formal Hearings. The Industrial Commission's Adjudication Division holds *de novo* (i.e., anew) hearings on discrimination charges at the request of either party after UADD determinations are

made. We agree that formal hearings should be *de novo*; administrative law judges (ALJs) should make findings of facts and conclusions of law anew without giving any deference to the judgments of UADD's investigation. We feel that the Legislature could allow UADD to participate in the formal hearing process, without violating the *de novo* concept, either by presenting the evidence gathered and their conclusions or by representing selected cause findings. In our opinion UADD's participation in formal hearings can improve the effectiveness of the state's anti-discrimination process in eliminating discrimination and make the process more fair for charging parties. We are not implying that ALJs or hearing procedures are biased toward one party or the other, but ALJs largely rely on the parties both to inform them about the relevant facts of the case and to argue the correct interpretation of the law. Often charging parties, including those who received cause findings from a state investigation, are unable to obtain effective legal representation. Prior to 1985, Utah law allowed UADD to present the case in support of a cause finding. Also, agencies in four neighboring states have statutory authority to represent some of their cause findings. UADD participation in formal hearings also would have a very beneficial effect on investigators by making their work more meaningful and providing valuable feedback from the ALJs.

Legislative Changes Could Control Withdrawals. The Legislature may want to consider changes to the Utah Anti-Discrimination Act to address charging party withdrawals from the state administrative process. Statutory changes could address two items. First, the Legislature should consider eliminating charging parties' ability to withdraw their cases after a formal hearing. In cases where frivolous claims were pursued to a formal hearing, that change would prevent charging parties from withdrawing to avoid attorney fees assessed by the judge. Second, the Legislature may consider making Utah law more similar to federal law by allowing judges to award punitive and compensatory damages when appropriate. In cases where charging parties have strong cases, that change would make the Utah administrative process more meaningful by eliminating the incentive that now exists for charging parties to withdraw to pursue their case in federal court.

Legislature Should Examine Organizational Structure. The Legislature should consider changing the organizational structure under which anti-discrimination law is administered and enforced in Utah. In our opinion, many of the problems described in this report result from administrative weaknesses that may be linked to UADD's placement within the Industrial Commission. Both of the last two directors of UADD report that they had difficulty managing the division because of their relationship with the commission. However, current commissioners feel UADD's management and leadership difficulties have been the result of personnel problems not organizational structure. Although our work was limited to the Industrial Commission's anti-discrimination function, more comprehensive studies have concluded that administrative effectiveness is hampered because authority is vested in a three-person body. Many critics of the existing system advocate the establishment of a Human Rights Commission to assume UADD's functions. While such a commission may be a reasonable approach to providing a more cohesive anti-discrimination process, it may not be essential. Among other options, the

existing commission could be restructured to clarify administrative responsibilities and segregate them from judicial functions.